91-281

No. 91-29

Supreme Court, U.S.
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

CITY OF OKLAHOMA CITY, et al.,

Cross-Petitioners.

v.

RAYMON J. MELTON,

Respondent.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX TO CROSS-PETITIONS FOR CERTIORARI

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UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RAYMON J. MELTON, Plaintiff-Appellee, Cross-Appellant, v. CITY OF OKLAHOMA CITY; LLOYD A. GRAMLING; GERALD L. EMMETT; MARVIN MAXWELL; WILLIAM R. CHAMBLESS; CARL SMITH; ROBERT TAYLOR; DAVID MCBRIDE; PAULA HEARN; JOHN DOE; RICHARD ROE, and Other Unidentified Individuals, Defendants-Appellants, Cross-Appellees.	)	Nos. 85-1738 85-1739 85-1740 85-1741 85-1742 85-1811 (D.C. No. CIV-84-65-E) FILED APR 15 1991

JUDGMENT
Entered March 19, 1991

Before McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

This cause was submitted to a panel of the court on the record on appeal from the United States District Court for the Western District of Oklahoma, was argued by counsel, and decided by opinion filed June 21, 1989. The cause was subsequently reheard en banc and an opinion on rehearing en banc was filed March 19, 1991.

Upon consideration whereof, it is ordered that the judgment of the district court is affirmed in part and reversed in part. Further, that portion of the judgment of the district court entered in favor of plaintiff on his liberty interest claim is vacated. The cause is remanded, and the district court is instructed to enter judgment for the defendants on the plaintiff's liberty interest claim and to conduct other proceedings in accordance with the court's opinion filed June 21, 1989.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

INSTRUCTION NO. 5

FIRST AMENDMENT CLAIM

Plaintiff contends that his First Amendment right to freedom of speech was violated as follows:

1. He was discharged from his employment as a police officer with the Oklahoma City Police Department for making a tape recording of his conversation with the federal prosecutor and for giving the tape recording to the attorney for a person accused of a crime; and,

2. He was discharged from his employment as a police officer for appearing as a defense witness at the accused person's trial in federal court.

In order to prevail upon his civil rights claim against the defendants for a violation of his First Amendment right to freedom of speech, plaintiff must establish the following elements by a preponderance of the evidence:

FIRST: That his actions in connection with the tape recording and/or in appearing as a witness in a federal proceeding were constitutionally protected; and,

SECOND: That the exercise of his constitutional right to freedom of speech was a motivating factor in the defendant City's decision to terminate his employment.

It is the duty and responsibility of every citizen to participate in the due administration of justice. If a citizen has information which be believes will help ensure that justice is done, then he should voluntarily, and without reservation, make that information available.

Whether he gives it to the prosecution or to the defense makes no difference.

With regard to the tape recording plaintiff made of his conversation with the federal prosecutor, you are instructed that when one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he heard. It is but a logical and reasonable extension of this principle that a man takes the risk that his hearer, who is free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. Thus, the covert recording of a conversation such as the one involved herein is not improper either from a legal or ethical standpoint.

The Oklahoma City Police Code of Ethics provides: "Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty." You are told that as a matter of law the conversation between the plaintiff and Prosecutor Fredenberg contained "Brady" information that the prosecutor was obligated under court order to turn over to defense counsel in the Page case.

Thus, the question of whether or not it was proper to let Judge Page's lawyers have the recorded conversation depends upon your determination of whether the information was confidential in nature or was confided to him in his official capacity. If you so find, then it was improper for plaintiff to give same to Judge Page's lawyers, and plaintiff could legally be fired for failure to

keep it secret, unless revelation of such information was necessary in the performance of his duties.

On the other hand, if you find that the information was neither confidential in nature nor confided to him in his official capacity, or that revelation of the information was necessary in the performance of his duties, then the plaintiff could not be fired for failing to keep it secret.

If the Jury finds that the defendants or any one of them or any combination of them violated the plaintiff's First Amendment rights in this case by discharging him, then and in that event you must find in his favor even though you further find that he was afforded all of his rights under the "due process laws" because even the fullest hearing and the most complete opportunity to confront his accusers and to cross examine and produce witnesses to refute charges cannot operate to exonerate defendants from violation of plaintiff's First Amendment rights.

INSTRUCTION NO. 6

DUE PROCESS CLAIM – PROPERTY INTEREST

The "privileges and immunities" protected by Section 1983 of Title 42 of the United States Code include those secured by the due process clause of the Fourteenth Amendment to the Constitution.

You are instructed that the provisions for termination, as set forth in the Oklahoma City Police Department Manual and in the Policy and Procedures Manual for the City of Oklahoma City, are sufficient to give the plaintiff a legitimate expectation that his employment would continue absent cause for discharge. Hence, a property interest in his continued employment was created which must be afforded constitutionally guaranteed due process.

You are further instructed that, under the laws of the State of Oklahoma, retired police officers may retain their status as peace officers of the State of Oklahoma, retired. An officer who retains such status may retain the right to keep and bear firearms when approved by the officials of the municipality of retirement.

You are also told that the City of Oklahoma City has an important interest in the efficient functioning of the city machinery which may be impeded by imposing a requirement of adversarial, trial-like hearings for every discharged employee. Therefore, as a general rule, a discharged City employee is not entitled to have an attorney present at a grievance hearing, to be present when others testify against him, or to cross-examine witnesses.

Accordingly, you are instructed that before a person is deprived of a protected property interest in his continued employment with the City of Oklahoma City, due process requires at a minimum that:

(1) He must be afforded an opportunity for a hearing before an impartial tribunal;

(2) The hearing must take place before the termination becomes effective;

(3) The affected person must be given notice of the charges against him a reasonable time before the hearing is to take place;

(4) The affected person must be given an opportunity to be heard at a meaningful time and in a meaningful manner, appropriate to the nature of the case.

Should you find that all of these requirements were fulfilled in this case then the plaintiff's right to due process was not violated. However, should you find that all of these requirements were not fulfilled then the plaintiff's right to due process was violated and you should award the plaintiff the amount of damages which you find were proximately caused by this violation.

INSTRUCTION NO. 7

DUE PROCESS CLAIM – LIBERTY INTEREST

As stated before, the Fourteenth Amendment to the Constitution provides that no state shall deprive any person of his liberty without due process of law.

The concept of liberty recognizes two particular interests of a public employee:

(1) The protection of his good name, reputation, honor and integrity; and,

(2) His freedom to take advantage of other employment opportunities.

These are two separate liberty interests, and the manner in which a public employee is terminated may deprive him of one or both of these interests. When the termination is accompanied by public dissemination of the charges against him, and those charges would stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may have an opportunity to clear his name. Where the allegations are of a serious nature, such as perjury or unethical conduct, the hearing must meet the minimum requirements of due process, and, additionally, must allow the employee to be accompanied by an attorney and to confront and cross examine his accusers.

In order to prevail upon his civil rights claim against the defendants for a violation of his right not to be deprived of a liberty interest without due process of law, plaintiff must establish by a preponderance of the evidence the following elements:

FIRST: That plaintiff's termination was accompanied by public dissemination of the charges against him;

SECOND: That the reasons for his dismissal would stigmatize his good name, reputation, honor and integrity, or foreclose future employment opportunities; and,

THIRD: That plaintiff was not afforded the opportunity to clear his name at a hearing which met all of the following requirements of due process:

(1) A hearing before an impartial tribunal;

(2) A hearing before the termination becomes effective;

(3) Notice of the charges against him a reasonable time before the hearing is to take place;

(4) An opportunity to be heard at a meaningful time and in a meaningful manner; and

(5) The opportunity to be accompanied by his attorney and to confront and cross examine his accusers.

INSTRUCTION NO. 8

DEFENSE OF GOOD FAITH

You are instructed that the individual defendants in this action have raised the defense of qualified "good faith" immunity by alleging that each defendant acted in good faith in connection with plaintiff's termination from employment. In this regard, you are instructed that a defendant in a civil rights case can establish as a defense to liability for damages under the Civil Rights Act a showing that he acted in good faith.

You are instructed that for an individual defendant to be entitled to good faith immunity for his actions, he must prove by a preponderance of the evidence:

FIRST: That he was acting within the scope of his office and was performing the duties of that office during the times relevant to plaintiff's claims in this lawsuit;

SECOND: That his conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

With regard to the second element you are told that if the law at that time was not clearly established, an official could not fairly be said to "know" that the law forbade such conduct. However, if the law was clearly established, the defense of good faith ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading good faith as a defense claims extraordinary circumstances and can prove that he neither knew nor

should have known of the relevant legal standard, then the defense should be sustained.

You are further instructed to keep in mind that a "good faith" defense is available only to the individual defendants and not to the City of Oklahoma City.

* * *

[p. 935] BY MR. NAIFEH:

Q Would you state your name, please.

A Carl Scott Johnson.

Q Mr. Johnson, how are you employed?

A I'm the City Manager of Oklahoma City.

Q How long have you been the City Manager for Oklahoma City?

A Three years.

Q Briefly describe for the jury your past history with the City of Oklahoma City.

A I was hired as Assistant City Manager in late 1976. Served as Assistant City Manager continuously until November of 1981 and was appointed City Manager at that time.

Q As City Manager, would you briefly tell the jury what your duties and responsibilities are?

A I'm the chief administrative officer of the City government, serve at the pleasure of City Council, hired by City Council, can be removed by City Council with or without cause.

As the chief administrative officer, I have responsibility for hiring and firing all employees, for conducting the day-to-day operations of the City government, for recommending policy measures to the City Council, and for carrying out the City Council's policies.

Q I would show you what's been marked as Defendants' [p. 936] Exhibit Number 1 and ask you to look through that and tell me if you can identify that.

A It appears to be portions of the City Charter, Article 3 relating to municipal employees. Contains the portion providing the authority to appoint and remove employees be the duty of the personnel director, and how employees are classified.

Q Does it contain a portion of the charter that relates to the duties of the City Manager?

A Yes, it does, in Section 3 of Article 4.

MR. NAIFEH: Offer this at this time, your Honor.

THE COURT: Let it be received.

Q (by Mr. Naifeh) Mr. Johnson, how is a charter adopted?

A It's adopted by the majority vote of the people.

Q So this charter was adopted by a majority vote of the people of the City of Oklahoma City.

A Yes, that's correct. And any amendment also must be voted on by majority of the people.

Q I hand you what's been marked as City Exhibit Number 12 and ask if you can identify that.

A That's a portion of the City's personnel policies relating to grievances and contains a section establishing a grievance Review Board and procedures for appeal.

Q That's not the Oklahoma City Police Department Disciplinary Review Board, is it?

* * *

EXHIBIT SHEET

No. ___ of ___ Pages

Case No. 84-65-E Style Melton vs. City of OKC
Judge Eubanks C.R. Deputy Miller Reporter Delbeck
Defendants Exhibits

Exhibit Number	Description of Exhibit	Date Adm.	Disposition
1	Okla. City Charter	2/1/85	
2			
3			
4			
5			
6	FOP Agreement	1/30/85	
7			
8			
9	Internal Affairs Report		
10			
11			
12	Personal Policy	2/1/85	
13			
14	Minutes of Grievance Committee	1/30/85	
15	Resume	2/1/85	

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAYMON J. MELTON, Plaintiff – Appellee/ Cross – Appellanti, v. CITY OF OKLAHOMA CITY; GERALD L. EMMETT; MARVIN MAXWELL, Major; WILLIAM R. CHAMBLESS; CARL SMITH; ROBERT TAYLOR; DAVID MCBRIDE, Lieutenant; PAULA HEARN; JOHN DOE; RICHARD ROE, and Other Unidentified Individuals; LLOYD A. GRAMLING, GERALD L. EMMETT; MARVIN MAXWELL; ROBERT TAYLOR; PAULA HEARN, Defendants–Appellants/ Cross–Appellees.	)	No. 85-1738

ORDER

Filed November 21, 1989

Appellant's motion for an extension of time to file a brief on rehearing is granted. Appellants' brief shall be filed on or before November 27, 1989. The order of November 3, 1989, calls for a brief so the rules governing

principle briefs applies. The limitation is 50 pages but the parties are admonished to be succinct.

By operation of Fed. R. App. P. 41(a) issuance of the mandate is stayed pending disposition of the pending petitions for rehearing.

Rehearing was granted by the court en banc.

Entered for the Court

Robert L. Hoecker, Clerk

By /s/ Patrick Fisher
Patrick Fisher,
Chief Deputy Clerk